

WASHINGTON, May 27, 1861.

HON. S. P. CHASE,

*Secretary of the Treasury:*

SIR: In reflecting on your suggestion of a difficulty, which in your conversation with Mr. Stanton was apparently entertained by you in my case, to wit, whether the action of Col. Johnson, in impressing my firm's train, compelled them to remain with the army, or whether they had not the alternative right, as suggested in the Auditor's report, to leave the army and return back with their trains, or, in other words, whether the action of Col. Johnson was intended only to have the effect of a blockade. Permit me to invite your attention to the following extract of a communication addressed by me to the late Attorney General upon that point. The third section of the act of March 3, 1849, enacts: "The claims provided for under this act shall be adjusted by the Third Auditor under such rules as shall be prescribed by the Secretary of War, under the direction or with the assent of the President of the United States, as well in regard to the receipt of applications of claimants as the species and degree of evidence, the manner in which such evidence shall be taken and authenticated, which rules shall be such as, in the opinion of the President, shall be best calculated to obtain the object of this act, paying a due regard as well to the claims of individual justice as to the interest of the United States."

The claimants have accordingly filed their evidence as required by the rules adopted by these officials; the Third Auditor is therefore bound to adjust their claim, according to this section, by this evidence. Let me also observe, that the Third Auditor is bound to execute this law; that is to say, all laws must be executed in good faith, and the Auditor is prohibited from seeking any escape from that evidence, or evasion of its purport, by a report to surmises or conjectures. It is made his duty to adjust the claim by the evidence filed in conformity with the rules established by the Secretary of War; in other words, he is to execute this law, and he has no right to evade, much less to depart from that evidence, or to dispense with the act. In the printed argument of Senator Green, he gave a brief summary of that evidence, substantially as follows: The evidence in the Porter's case shows the order of Col. Johnson, dated the 19th October, 1857, and it also showed that Col. Johnson then took possession of their trains, forced them by a military escort into the rear of his camp, and from that time took control of them and subjected them to military orders, held them by force in the military service, and

controlled them by the same orders as he did the Government trains, and *compelled* them to march with his troops in the line of march, and for that purpose they were kept standing for hours yoked to the wagons, and exposed to the most destructive weather. These facts constitute the *res gestæ* of this proceeding. The evidence also shows that 236 oxen died for want of forage while being indiscriminately used, 3 mules and 2 horses while hitched to Government wagons, and 24 wagons were lost unavoidably by necessary abandonment. With all this evidence before you, I am asked, after Col. Johnson seized these trains and took the exclusive control of them, and *compelled* the trains to march with his army, whether the Porters could not have left with their trains and returned home? It must be conceded, that the only possible way they could have done so, must have been by the permission of Col. Johnson. That any such permission was given by Col. Johnson is flatly contradicted by this array of proof, and by the public declarations of Col. Johnson. The trains were in his possession. How then could they take them back? Before I advert to this proof, I beg leave to call your attention to the nature of this possession of Col. Johnson. What was it? An adverse possession, excluding the owners from all control over their trains. The trains were taken and held by military force and controlled by military orders. Now, that is an impressment, and is authorized by this very act. In Harmony's case, the Supreme Court say: "The goods being under the control of Col. Doniphan, and subject to his orders, were no longer in the possession and control of the owners. It is true the owner was present and took care of the goods during the march, but what he did was by the orders of the military authorities." This ruling accords with common sense, as you must admit, that a man who has not the possession or control of his property, but which is exclusively under the control of another, cannot exercise any right of ownership, or either use or take it where he pleases. He can neither go with it or take it, but as the adverse possessor shall order and direct. Now, the Porters' is a much stronger case than Harmony's. Harmony was present with his property; the Porters were not. White, Porters' agent, was excluded from the possession and control of their trains. They were not in his custody. Besides, he had no right to assume the power to deviate from the direction of his principals, and this alone negatives the Auditor's surmise, that he could have asked to have left the army for the purpose of returning with his trains. There is not a particle of evidence to show that he ever requested to return, much less that Col. Johnson did in fact, or would have, if *requested*, suffered him to have gone back with the trains. Before

you can for a moment entertain such an objection, you must have some proof of the fact. Vague conjecture will not be sufficient to warrant you in concluding that Col. Johnson did actually grant this privilege. You are to determine this question on the facts; that is to say, such as show what *Col. Johnson did*, and not what was omitted to be done by him. Now, then, I refer you to the declarations of Col. Johnson, which entirely rebut the presumption that he ever did offer, or would have allowed the trains to have been taken home. In the first place we have Col. Johnson's report to the Secretary of War, in which he states, "that his army was in a most *critical* condition, and that he felt himself compelled to arrest these trains on their march, and *detain* and *keep them* in his possession, *subject to his order and control*, to prevent supplies from being forwarded to the Mormons." Let me call your attention to his words, "*detain* and *keep them* in his possession, and subject to his order and control." Now, can these words justify any one in supposing that Colonel Johnson would have for any reason abandoned that possession? How could he then detain and keep them in his possession; that is to say, hold to them, which he had thus determined to do, and let them go home? It is utterly inconsistent with his report. Again: Col. Johnson, in a recent letter, referred to in the last paragraph of the Auditor's report in reply to a letter from myself, inquiring whether, under *any* circumstances, he would have permitted these trains to have left the army, says, in a most emphatic manner, that "had they attempted to have gone back or left the army, he would have used military force and interposed to prevent them." Yet, after these emphatic declarations in his report officially made, and in his letter, could any one suppose that the Third Auditor would have done such injustice to these claimants as to state as follows: "Finally," says the Third Auditor, "it does not appear from the *evidence* that there was any *unwillingness* on the part of these trains to accompany these troops after this order was given." Has the Auditor read the claimant's evidence? Surely he would not intentionally misstate it. See White's affidavit, November 9th, 1860. He swears that he protested against Gen. Johnston's order; did not stop; was anxious to advance, and could have made his journey in time. That, through J. C. Irwin, he addressed a letter to Col. Johnson, "asking permission to proceed to Salt Lake city, representing the great loss to his employers if forced to fall back and move in the line of the army." Notwithstanding this evidence, the Auditor states, that "there was no unwillingness on the part of the trains to accompany these troops after this order was given." Even if this was so, it could not affect the claim. Has the Auditor any definite

or proper idea of what is meant by compulsion? If a man is coerced by military power to do an act, what difference does it make whether he does it willingly or unwillingly? The act must be done, and the performance of it does not depend on his will or pleasure. Here the owners had neither the possession or control of the trains.

Capt. Dickerson, the senior quartermaster of Col. Johnson's command, says: "the order of march was communicated by Col. Johnson, and I was directed by *him* to see that each train was started in its place in the column. Col. Johnson would not allow them to proceed in advance of the army, but *compelled them to remain and move with it.*" This is confirmed by order No. 36, assigning their position in the train. Col. Johnson further ordered, immediately after the impressment, our agent, White, "to furnish Col. Smith the names and their occupation of the men in your employ, or in any manner accompanying your trains." In the same order he cautions us against permitting our men from leaving camp, and required us "to report their presence and absence every morning." Annexed find copy of the order marked A, which was served on the three trains.

Capt. Albert Tracy, of the 10th infantry United States Army, states that "many of the oxen, while they were thus impressed or taken for and *used* in the *military service*, died or were abandoned on the highway." He also says, "that the cattle got less than their ordinary supply of grass and forage and died, therefore, more rapidly. That they were used indiscriminately in government wagons, without regard to ownership."

Van Epes, Capt. Dickerson's wagon-master, swears "that these trains were compelled by the military orders to travel with the army—their wagon-master had no control except in subordination to the military command."

This military control, and military discipline is admitted by the Auditor in a communication to General Gibson, Commissary General, dated October 15, 1860. "It appears," says he, "that the trains of the claimants fell in with Gen'l Johnson's army, at or near the South Pass, in October, 1857, and by an order of his, issued on the 19th of that month, WERE COMPELLED TO MOVE *with it*, and were prohibited from pursuing their journey, and fulfilling their contract with their employers, as peaceable citizens, and lawful traders and transporters.

Thus far, then, the evidence establishes the most positive compulsion, that force was exerted to compel the trains to travel with the army. So far, then, it amounts to a flat contradiction that they had any right to go back. They were compelled by Col. Johnson to "advance and move with the army," subject to his

control, and that excludes the contrary inference that they could return. Yet the Auditor, in the face of all this testimony and his own declarations, declares in his report, that "Indeed it would appear as if when the alternative was presented to abandon their journey and return with their trains, or to proceed in company with the army, receiving its protection, and therefore subject to military control, they choose the latter, and thus, of their own volition, accepted the consequences resulting therefrom." It is true, he says, Col. Johnson, in one of his late letters declares, "that had they determined differently, and attempted to go back, that he would have interposed to prevent them; but the fact that no such thing was attempted indicates their satisfaction with the course proposed, and an acceptance of the proffered protection of the troops." This is not sophistry. It is blunder after blunder. It is not, permit me to say, the fair statement of a judge. In Mr. Green's first argument he complained that the Auditor had done injustice to the testimony, in which opinion, I think, you must concur.

Now, one would suppose, from the above extract from the Auditor's report, that the evidence shows "that the alternative to abandon their journey and go back, or proceed with the troops, was presented to them by Col. Johnson. No such thing. No such alternative was ever presented. Our agent had *no choice* in the matter, but as Col. Johnson reports to the Secretary of War, states "he arrested the trains and determined to *detain* and *keep* possession of them, and subject them to his control." Next we have this other evidence of Col. Johnson, referred to by the Auditor, "that had they determined differently and attempted to go back, he would have interposed to prevent them;" that is to say, had they not obeyed his order when he took and held possession of the trains, he would have used military force to coerce an obedience to his orders. One would suppose that this would be sufficient to convince him, even against his will, that these trains could not have gone back, and had it been attempted, Col. Johnson would have prevented it. Well, I have shown that our trains were subject to Col. Johnson's orders, were in his possession, and controlled by him. He compelled them, by this order, to *advance* with the army. How then could they go back? He says he would have prevented it.

Where then was the alternative? If a man overpowers me in the street, and kidnaps me, and compels me to accompany him, and I sue him for damages, and prove the force and duress, what would be thought of a judge who should exclaim: Why did you not go back? You did not resist, and therefore you cannot recover. You had this alternative, I show that I was com-

pelled to go, and could not resist. How then could the judge decide that I went willingly, and could not recover. Such is the Auditor's wise conclusions. But that is not all. There is yet a more remarkable specimen of logic. The fact that our wagon-master did not attempt to go back in resistance of this military power, when Col. Johnson had possession of the trains and controlled them by their orders, indicates, says the Auditor, "their satisfaction with the course, and an acceptance of the protection;" just as if Col. Johnson's order, and his control and possession of the trains, were to be considered as an invitation to his company, or a friendly and courteous act, and was not in any sense the exercise of military power. Thus ends my comments on this evidence, which shows that Col. Johnson arrested the trains by his order, took possession of them, subjected them to military control, and that he determined to detain and keep the trains in his possession, and would not have let them go back if they had attempted it, which, let me say, repels the inference that he ever would have given them the liberty to return with them. The possession was in *him*, not in the *claimants*. To detain and keep them was his object, and this he effected and executed.

After you have carefully examined the evidence, and the opinion of the Attorney-General, I feel confident that you will no longer adhere to the impression that General Johnson did not take the entire and exclusive control of the trains, and that such exclusive possession did not prohibit any movement by the owners or their agents, either *forward or backward*; but, such only as General Johnson, by his orders, had directed. So has adjudged the present Attorney-General, and a respect for that officer's opinion, which has universally been deferred to by the Departments, should alone be sufficient to remove this objection. The Third Auditor has conformed his judgment to Mr. Bates's opinion, and has awarded to the claimants the sum of \$10,100. A warrant has been issued for that amount, and all that remains to enable the claimants to receive the money is your signature to this warrant. Permit me, then, respectfully, to suggest, that the 14th section of the act of March 3d, 1849, directs when "the judgment of the Auditor shall be in favor of such claim, the claimant, or his legal representatives, shall be entitled to the amount thereof upon the production of a copy thereof, certified by said Auditor at the Treasury of the United States."

This certified copy has been obtained and presented, and the money demanded, as the act of 1849 directs. This act, then, imperatively enjoins the payment of the amount. The Third Auditor's judgment being made final and conclusive. There can be

no variance of opinion on that point. It is too clear for controversy—so thought Attorney-General Legare, who said, “that Congress have invested the Third Auditor with special judicial authority *quo ad hoc*, and that his judgment is to be final.” (See Attorney-General’s Opinions, April 6, 1842.) All controversy, then, is now stopped.

The Third Auditor has rendered a judgment in the case, and that decides the cause. This judgment is sustained by the able decision of the Attorney-General. “On the whole case,” says that learned officer, “I am of opinion that the claimants are entitled to be paid for the cattle, mules, horses, and wagons lost or destroyed on the route from South Pass, under the provisions of the act of March 3d, 1849.” May I not then respectfully ask you to execute the last act which the law positively directs shall be done, to enable the claimants to receive their money, and that is the affixing of your official signature to the warrant that is required for its payment.

It is supposed that a large amount is embraced by the opinion of the Attorney-General. This is a mistake. The provision of this law has been in force since the passage of the act of January 18, 1837, and extended by the act of March 3, 1849, and by referring to a recent letter of the Third Auditor of the 24th inst., herewith appended, marked B, you will find that only two claims, besides this, have been filed, and only \$1,925 allowed, besides the allowance made to my firm. An impressment of property by a commanded officer seldom occurs. During the Mexican war only one case occurred, and the property impressed was not such as the act of 1849 provides for. I now rest the case with you.

Very respectfully, your obedient servant,

RICHARD H. PORTER,  
*Of the Firm of Jas. & R. H. Porter.*

[A]

HEADQUARTERS ARMY OF UTAH,

*South Pass, en route to Salt Lake City, October 22, 1857.*

I am directed by the colonel commanding to call upon you to furnish Brevet Colonel C. F. Smith, 10th infantry, as soon as practicable, the names and their occupations of the men in your employ or in any manner accompanying your trains.

He also directs that all men be taken in charge and sent under safe escort to Colonel Smith who may visit your camp or be found loitering in its vicinity, if not personally known to belong to any of the trains. All persons, no matter who they are, coming from a distance, will be escorted in like manner to that officer.

He likewise cautions you against permitting your men to leave camp for any length of time during the day, and requires you to report their presence or absence every morning. He forbids all communication or messengers being sent in advance of this force, except by permission of the commanding officer, (Colonel Smith,) the application to be made in writing.

I am, sir, very respectfully, your obedient servant,

F. J. PORTER,

*Assistant Adjutant-General.*

---

[B]

THIRD AUDITOR'S OFFICE, *May 21, 1861.*

SIR: In reply to your note of yesterday's date, I have the honor to say, that no claims under the second section of the act of 3d March, 1849, have been presented or allowed by this office during the last six years, except one in the name of Davidson Callahan, allowed April 6th, 1860, for \$1,925, and that of J. & R. H. Porter, recently allowed under opinion of the Attorney-General.

The only case of the same kind of Porter's that I have any knowledge of is that of Irwin & Co., but it has not been presented to this office. There may, however, be others of which I have no knowledge.

I am, very respectfully, your ob't serv't,

R. J. ATKINSON, *Auditor.*

Hon. F. P. STANTON, *Willard's Hotel.*



Norman, son  
R. M. Foster, Claim

Norman, son  
R. M. Foster, Claim